Supreme Court of the United States.

No. 149.

EDWARD W. BURBANK, PLAINTIFF IN ERROR,

vs.

EDMUND B. BIGELOW.

BRIEF OF COUNSEL OF EDMUND B. BIGELOW, DEFENDANT IN ERROR.

The case displayed by the record is this:

Edmund B. Bigelow, the defendant in error, was in commercial business at Montgomery, Alabama, with T. S. Burbank, a brother of the plaintiff in error, under the style of Burbank & Bigelow, which firm shipped cotton and other produce and merchandise to E. W. Burbank, the plaintiff in error, and to others, who paid the proceeds to the latter, amounting in all to $42,509 20.

Bigelow, alleging himself to be entitled to one-half of this amount, brings his action against E. W. Burbank, and joins as defendant his partner, T. S., under an allegation that he, T. S., had conspired with E. W. to deprive Bigelow of the whole amount, by the false pretext that the shipments were made for the sole account of E. W. (See Petition, Record, pp. 1 and 2.)

T. S. Burbank, the former partner of Bigelow, excepted to the suit, as far as he was concerned. (See Record, p. 9.) His exception was sustained by the court below. (See Rec., pp. 21 and 22.) And the litigation went on, then, only between Bigelow and E. W. Burbank.

E. W. Burbank filed an answer denying only an indebtedness and the conspiracy to defraud charged by plaintiff below. It admits, of course, all the other allegations of the petition. (See Rec., pp. 8 and 9.)

The case was tried before court and jury on the 27th of February, 1866, and a verdict given for plaintiff for

$13,864 34, and judgment rendered in accordance with it. (See Rec., p. 42.)

There was no bill of exception taken during the course of the trial in the court below.

The record contains what is called a "statement of the evidence," (see Record, pp. 109 to 139,) to which is appended a certificate of the judge before whom the cause was tried, "that it is a correct transcript of the testimony, as given to the jury in the case," and this is made nine months after the trial took place, in February, 1866, (see Record, p. 42,) and the judge's certificate being dated in the November following. (See Rec., p. 139.)

The only bill of exception on the record, is that taken by the counsel of plaintiff in error, in the court below, to the refusal of the judge to charge the jury in form and manner as requested by him. (See Rec., p. 41.)

It is submitted here—

1. That the court below was without authority in law to make such a statement of facts, as the cause was tried by the aid of a jury, and the facts cannot be reviewed in this court. (Amendment to the U. S. Constitution, art. vii.)

2. As to the bill of exceptions in the record, (p. 41,) there is nothing in them presented on which the mind of this court can act, so as to know and determine judicially that the judge of the court below erred in refusing the charges asked for, since there is nothing to show that such a charge was pertinent to the issue or to the evidence adduced on the trial, or had anything to do with the case. The bill of exceptions does not show the matter of law excepted to. (See Rules of this court, No. 4.)

Zeller's Lessee *vs.* Eckert, 4 Howard, p. 297.
Stimpson *vs.* West Chester Railroad, 3 Howard, pp. 555–6.

3. The bill of exceptions does not state that any evidence had been offered to the jury of the facts on which the opinion of the court was prayed.

Vasse *vs.* Smith, 6 Cranch, 226.

4. This writ of error ought not to be entertained here, because the plaintiff in error moved for a new trial in the court below on grounds identical with those embodied in his bill of exceptions to the charge of the judge *a quo* to the

jury. (See his bill of exceptions, Rec., p. 41; see his grounds for a new trial, Rec., p. 43.)

Having fully argued his grounds for a new trial (see Rec., p. 44,) before the lower court, he was not entitled to a writ of error. This double remedy is not afforded at law. (See Cunningham *vs.* Bell, 5 Mason, p. 173):

"The court will not allow a party to move for a new trial, and when this is refused, to fall back upon the bill of exceptions."

Kerr's Action at Law, p.* 296.

5. The cause should be dismissed by this court, because the writ of error, to operate as a *supersedeas*, was not applied for, or served within ten days after rendering the judgment, as required by sec. 23, act of September 24, 1789, 1 Statutes at Large, p. 84.

The judgment was rendered on the 27th February, 1866. (See Rec., p. 42.)

The writ of error was allowed on the 24th March, 1866, (see Rec., p. 45.) and was only served by being lodged in the clerk's office, of the circuit court, in which the case was tried, on the 26th March, 1866. (See Rec., p. 140.)

Respectfully submitted,

THOMAS J. DURANT,
For E. B. BIGELOW.

WASHINGTON, D. C., *December* 28, 1867.

Supreme Court of the United States.

No. 149.

EDWARD W. BURBANK, PLAINTIFF IN ERROR,

vs.

EDMOND B. BIGELOW.

Bigelow, the plaintiff below, one of the partners of the firm of Bigelow & Burbank, (T. S. Burbank,) filed his petition in the circuit court of the United States for the State of Louisiana against Edward W. Burbank, the brother of his partner, and also against his partner, T. S. Burbank, charging fraud between the two Burbanks to defeat his rights, and claiming that Edward W. Burbank owed the firm of Bigelow & Burbank a certain sum of money, one-half of which he asks that the court compel Edmond W. Burbank to pay to him.

T. S. Burbank, before answering, filed a peremptory exception, (see transcript, p. 9,) and the suit was dismissed as to him. (Transcript, p. 22.)

Edmond W. Burbank, after a general answer of denial, (transcript, p. 8,) also filed a peremptory exception. (Transcript, p. 29.) The court overruled this peremptory exception, on the ground that it "came too late." (Transcript, p. 30.)

The case went to the jury, and a verdict was rendered for $13,864 34, in favor of plaintiff below, Bigelow.

E. W. Burbank sued out his writ of error.

1. The action in this case is brought by one partner against a debtor of the partnership, the other partner not being joined in the action. It is submitted that no such action can

be maintained. This is so clearly the case in courts of common law, acting under the rules of pleading of the common law, that it is not deemed necessary to cite authorities.

Nor can such action be maintained by the Louisiana practice.

In Cutler *vs.* Cochrane, (13 La. Reports, p. 482,) the court held that in the dissolution of a commercial partnership by mutual consent, it still continues for the purposes of liquidation, and all the partners *must* join in a suit against any of its debtors for the collection of debts due the firm. The general rule is, that in actions founded on contracts all the joint contractors must be made parties. (Civil Code, 2080.) On the dissolution of a partnership by the death of a partner, the survivor cannot sue, without joining the representatives of the deceased one. An action cannot be maintained by one partner for the use of himself and the others, when his authority to sue is expressly denied and not proved."

In Hyde *et al. vs.* Brashear, and in Babcock *et al. vs.* same, (19 La. Rep., pp. 402–4,) it was decided that "all partners of a commercial firm must join in an action on an obligation due to the partnership. On dissolution of the partnership by the death of one partner, the survivors must join the representatives of the deceased, or obtain authority from the proper tribunal, before they can sue for a debt of the partnership. The incapacity of surviving partners to sue without obtaining authority or joining the representatives of the deceased, need not be specially denied. It may be assigned as an error."

In Crozier *vs.* Hodge, (3 La. Rep., p. 358,) the court held that, "by the laws of Louisiana, a surviving partner has not, as such, the right to sue or receive the debts due to the firm. The obligation is made to a commercial firm, and the parties composing it must join in the action; for the debt is due to the partnership collectively, and not to one or other of the partners as creditors in *solido*."

In Dick, *et al. vs.* Dunlap, (1 Robinson's Rep., p. 54,) the court said, that "surviving partners cannot sue alone for a

partnership debt. Representatives of deceased partners must join in the suit."

See further, the case Shipman *et al. vs.* Hickman, *et al.*, (9 Robinson's Rep., p. 149): "Where an obligation is made to a commercial firm, the parties composing it must join in the action; for the debt is due to the partnership collectively, and not to one or other of the partners as creditors *in solido.*" Where one of the partners is dead, his representatives must join in the action."

In Halliman *et al.*, *vs.* Clark *et al.*, (4 La. Annual Rep., p. 180,) held: that, "when an obligation is in favor of a firm, all the parties must join in the action to enforce its performance."

The decision in S. Robb and Co. *vs.* W. Bailey (13 La. Annual Rep., p. 457,) covers the same point: "S. R. sued, as payee, upon a note made payable to S. R. and Co., alleging that he had traded alone under that style and firm; defendant excepted, on the grounds that he had traded with S. R. and Co., and denied that plaintiff owned the note, or traded, as alleged, under the name and style of S. R. and Co. Held: that plaintiff, to recover as payee, should prove that he alone composed the nominal firm of S. R. and Co., to whom the note was made payable. This is not a case of an alleged non-joinder or mis-joinder of parties, where the defendant excepting is bound to point out how the error may be corrected. But the objection goes to *the right of action* upon the note; it denies that the plaintiff is the payee, or that he is even one of the payees."

A like decision was made in Rugely *vs.* Gill, (15 La. Annual Rep., p. 509,) "where a suit was brought in the name of certain persons, as composing a commercial firm, and the defendant excepted to the petition, upon the ground that all the members of the firm had not been joined in the action. Held: that where it was shown that the name of one of the persons used in the style of the firm was omitted, the burden of proofs was on the plaintiffs to show that they alone composed the firm. And, in case of the omission of one of the names appearing in the style of the firm, the

defendant is not bound to state in his exception the name of the partner not joined in the action."

In Ferguson *vs.* King, (5 La. Annual Rep., p. 642,) it was decided, that "in a suit on an obligation payable to himself 'and Co.,' plaintiff, who carries on business as a firm, using after his name 'and Co.,' must allege and prove that he alone is interested in the business, or he will be non-suited."

The rule, that all parties in interest must be parties to the suit, is only relaxed where it would be extremely difficult, inconvenient, or expensive.

Allard *vs.* Orleans Nav. Co., 14 Louisiana R., 27.

A general power to a partner to settle a partnership does not enable him to stand in judgment for the other partners. The power must be express and special.

Civil Code of 1825, 2966.

Gaieunse *vs.* Akin, 17 Louisiana R., 42.

All the partners must sue to enforce a partnership claim. If one be absent, he may be represented by a *curator ad hoc;* if dead, his representatives must join.

9 Robinson's R., 149.

4 Annual Louisiana R., 179.

3 Louisiana R , 358.

The omission to join the proper partners as defendants is not a matter of *form, but law*, and the partner sued may have the case dismissed.

Dougart *vs.* Desangle, 10 Robinson's R., 430.

2. It is submitted, therefore, that under the decisions of the courts of Louisiana, the plaintiff below could not maintain his action against the defendant below, the plaintiff in error here, and this error of substance in law appearing upon the record, this court will correct the error. The court below should have arrested the judgment. In Mercer *et al. vs.* The Mechanics' Bank of Alexandria, (1 Peters's R., p. 80,) this court held: "No authority need be cited to establish, that

whenever judgment ought to have been arrested below, this court is bound to arrest for error."

If it appear on the pleading that another should have been joined, who had been omitted, the defendant may demur, arrest the judgment, or bring a writ of error.

Breedlove & Robeson *vs.* Nicolet & Legg, 7 Peters's R., 418, 429, 430.
See Wilson *vs.* Lenox & Maitland, 1 Curtis, 395.
United States Bank *vs.* Smith, 6 Curtis, 247.
Suydam *vs.* Williamson, 30 Howard, 433.
Farni *vs.* Tesson, 1 Black. R., 309.
Rogers *vs.* Burlington, 3 Wallace, 661.
Bennett *vs.* Butterworth, 11 Howard, 669.
Slocum *vs.* Pomeroy, 6 Cranch, 221.
Garland *vs.* Davis, 4 Howard, 131.
Cohens *vs.* Virginia, 6 Wheat., 410.

It is submitted, therefore, that the judgment in this case should be arrested, without reference to the peremptory exception filed by the defendant below.

3. But it is clear that exception was in time, and should have been admitted by the judge on the trial. (See Tutrix *vs.* Porte *et al.*, 18 Louisiana Annual Reports, p. 456,) in which case the court says, "an exception that plaintiff is absolutely without right to stand in judgment, may be pleaded at any stage of the proceedings." See article 346, Code of Practice of Louisiana, which declares that "peremptory exceptions, founded in law, may be pleaded in every stage of the action previous to the definitive judgment, but they must be pleaded specially, and sufficient time allowed to adverse party to bring his evidence." The peremptory exception in this case was founded in law, and sufficient time allowed the adverse party to bring his evidence, because the facts set forth in the peremptory exception were set forth in plaintiff's petition.

4. In Fenn *vs.* Holme, (21 Howard, p. 485,) this court says: "A construction which would adopt the State practice,

in all its extent, would at once extinguish in such State the exercise of equitable jurisdiction. The court think that, to effect the purposes of the legislature, the remedies in the courts of the United States are to be at common law, or in equity, not according to the practice in the State courts, but according to the principles of common law or equity, as defined in that country from which we derive our knowledge of those principles."

According to this adjudication, it is submitted that the action in this case cannot be maintained, the remedy of the plaintiff below being in equity. (See further on this point, Preston *vs.* Keene, 14 Peters, p. 134,) where court held the petition in Louisiana court was a bill in equity.

5. As regards the points made in appellee's brief, the first, second, and third have no application to the grounds taken by the plaintiff in error here. Here the case is substantially put on the question of law, that one partner alone cannot maintain an action at law against a debtor of the firm. A ground which the defendant in error's three first points in his brief do not touch. As regards the fourth point in appellee's brief, the court below might refuse to grant a new trial, unless writ of error abandoned. But not having made this requisition, appellant is entitled to his writ of error.

6. In conclusion, the question in this case is, whether on a record so fatally defective in substance, and where exception was duly taken, the verdict will be allowed to stand. If the court so hold, it will be one of the most remarkable decisions ever made upon a writ of error proceeding upon common-law principles.

C. Cushing,
W. W. Boyce,
Counsel for Appellant.